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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/035,208	01/04/2002	Laure Thiebaut	05725.1002-00	3461

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EXAMINER	
COMSTOCK, DAVID C	
ART UNIT	**PAPER NUMBER**
3732	

DATE MAILED: 10/21/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/035,208	THIEBAUT, LAURE	
	Examiner	Art Unit	
	David C. Comstock	3732	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *31 July 2003* .

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-40* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1,2,12,14,15,18-20,26-32 and 34-37* is/are rejected.

7)☒ Claim(s) *3-11,13,16,17,21-25,33, and 38-40* is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☒ The drawing(s) filed on *04 January 2002* is/are: a)☒ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11)☐ The proposed drawing correction filed on _____ is: a)☐ approved b)☐ disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12)☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

13)☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☒ All b)☐ Some * c)☐ None of:

1.☒ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____ .

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

14)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) ☐ The translation of the foreign language provisional application has been received.

15)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ .
4) ☐ Interview Summary (PTO-413) Paper No(s). _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: .

DETAILED ACTION

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 2, 12, 14, 15, 18-20, 26, 27, 29, 30, 32, 34-40 are rejected under 35 U.S.C. 102(b) as being anticipated by Henk (EP-276-713-A).

Henk discloses a hair dye applicator comprising a compressible, resilient container 5, an applicator head having a plurality of applicator elements 22 on a movable support 2, and an opening 13 adjacent the base of the applicator elements. Some of the elements are in a row and have identical length. The entire container, including the end wall, comprises a handle, i.e., capable of being grasped by a user. The applicator is removably mounted to the container. The movable support rotationally slides on the device to open and close. A hair dye product is contained in the container. The device is used by sliding the device to an open position to apply dye to the hair of a user and then closing the device. (See Figs. 2 and 3 and Abstract.)

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claim 28 is rejected under 35 U.S.C. 103(a) as being unpatentable over Henk (EP-276-713-A) in view of Magharehi (5,937,866).

Henk discloses the claimed invention except for the lid. Magharehi discloses a dye applicator having a lid 43 to prevent the dye from drying out and oxidizing and to protect the user from unintended application to hands or clothing (see Fig. 1 and col. 3, lines 22-31). It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the applicator of Henk with a lid, in view of Magharehi, in order to prevent the dye from drying out and oxidizing and to protect the user from unintended application to hands or clothing.

Claim 31 is rejected under 35 U.S.C. 103(a) as being unpatentable over Henk (EP-276-713-A).

Henk discloses the claimed invention except for the dye product comprising a gel, cream, or paste. Gels, creams, pastes, and other various forms of dyes are functionally equivalent hair dye forms known in the art. Therefore, because these were simply art-recognized equivalents at the time the invention was made, one of ordinary skill in the art would have found it obvious to substitute gels, creams, or pastes, for liquid dyes. Moreover it is noted that it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. *In re Leshin*, 125 USPQ 416.

Response to Arguments

Applicant's arguments, see amendment, filed 31 July 2003, with respect to Kim (4,615,635), Di Vito (2,897,826), and Donley (4,090,522), have been fully considered and are persuasive. The rejections of claims 1-10, 12-14, 18-27, 29, 30, and 32-37, pertaining to these references, have been withdrawn.

Applicant's arguments filed 31 July 2003, with respect to Henkel (European Patent Application Number 0 276 713) have been fully considered but they are not persuasive.

In response to applicant's argument that Henkel does not anticipate the claimed invention it is noted that the opening 13, i.e. the ring of outlet holes, communicates with the container (see Fig. 3). Furthermore, this opening must be "configured to *allow* the product to be delivered" since when it is closed (in the initial position, as shown in Fig. 2) it is impossible for the product to be delivered; conversely, when it is opened (the second position), it does not impede the delivery of the product. In fact, it is the gate through which the product flows out of the container. Next, the opening 13 *allows* the product to be delivered outside the applicator elements at their very base through the opening 20 (see Fig. 3). It is also noted that the applicator elements are arranged in an annular ring such that the product is delivered outside of the tufts themselves (i.e., through the open center wherein there are no tufts), (see Figs. 1-3). It is further noted that the existence of the foil 14, which is torn at the first use by sliding the applicator around to its open position, does not prevent the reference from teaching the claimed

limitations as set forth above. Thus, the foil is irrelevant unless applicant precludes it through appropriate claim language (e.g., transitional language such as "consisting of").

Although now a moot point, for the sake of a complete record, claims 16 and 17 were rejected in the last office action as indicated both on the Office Action Summary and in the Office Action on page 4, line 19 - page 5, line 2 (DiVito (2,897,826) in view of Donley et al. (4,090,522)). By inadvertent typographical error, examiner simply did not type claim numbers 16 and 17 in the heading (page 4, line 1 of the Office Action).

Conclusion

Applicant's amendment, adding claims 38-40, necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to David C. Comstock whose telephone number is (703) 308-8514.

DC

D.C. Comstock
20 October 2003

KEVIN SHAVER
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 3700